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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)
)
Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(i))
of the Communications Act)
Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

To: The Commission

COMMENTS

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SUMMARY

The 800 MHz SMR industry has realized amazing growth and development in an historically cooperative regulatory environment. This cooperation, coupled with the industry's desire to provide a needed service at a reasonable cost has resulted in a great benefit to the public interest during the tenure of the traditional dispatch SMR operator. Now, however, the industry has grown. Its largest competitors have been consumed by a single SMR competitor, Nextel. As if the consolidation of the major 800 MHz SMR competitors throughout the United States were not enough, Nextel has now asked the Commission to give it the means to acquire substantially all of the valuable SMR frequencies in markets it desires to implement a digital communications system utilizing equipment that it admits is taking "much longer than expected"¹ to develop.

In order to give this single competitor what it asks, the Commission must displace a large number of the thirty-three thousand (33,000) incumbent SMR licensees, or, at the very least strangle their growth by freezing them in place both with respect to geographic position and frequency number and position.

Clearly, implementation of the proposal set forth by Nextel and then by the Commission in the Further Notice is inimical to the public interest, as it is contrary to the goals enumerated by the Commission and Congress with respect to this very proceeding.

The Commission must honor its obligation to preserve competition in the wireless services marketplace. It must decline Nextel's invitation to make it the single 800 MHz SMR service provider. The Commission must, instead, preserve the interests of incumbent

¹ Guatam Naik, *For Nextel, '94 Was Best of Times and Worst of Times*, Wall St. J., Jan. 3, 1995, A14. Attached hereto as Exhibit 1.

800 MHz SMR licensees which currently provide a needed service to the public at a low cost to the end user.

Clearly the Commission's goals and Congress' goals are threatened by adoption and implementation of the proposal set forth in the Further Notice of Proposed Rulemaking in this proceeding. Compromise of these important goals is absolutely contrary to the public interest. Additionally, implementation of this proposal threatens the very existence of the incumbent 800 MHz SMR industry.

In contrast, CCI presents a proposal which directly promotes the goals noted by the Commission and Congress while preserving the 800 MHz SMR industry. CCI would leave to the private marketplace the consolidation of frequencies and territories to create cooperative wide-area regional, and eventually, even national systems.

For these reasons, the Commission must decline the invitation to make Nextel the only 800 MHz SMR competitor and maintain the robust marketplace which has brought this industry to its current strong competitive position.

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To: The Commission

COMMENTS

I. BACKGROUND

On October 20, 1994 the Commission adopted the Further Notice of Proposed Rulemaking in its proceeding implementing the mandate of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002(b), 107 Stat 312, 392 (1993) ("Budget Act") to establish a single class of commercial mobile service in PR Docket No. 93-144, RM-8117, RM-8030, RM-8029 and PP Docket No. 93-253. By this Further Notice, the Commission solicited comments on a proposal to auction license rights to serve Major Trading Areas ("MTAs") using 800 MHz SMR frequencies which are already licensed to other entities. Chadmoore Communications, Inc. ("CCI"), by counsel, opposes

the proposal as contrary to the public interest and antithetical to the Commission's goals set forth in the Further Notice and to the goals set by Congress,¹ and effecting an unconstitutional taking of the incumbent licensees' interest in the bundle of rights attendant to the building of a business based on a Commission authorization. CCI presents an alternative approach which achieves the Commission and Congressional goals without compromising the rights of incumbent licensees.

In establishing a new "regulatory framework"² in response to a Congressional mandate, the Commission must first identify the goals it wishes to reach in the establishment of such a new regulatory framework, including any Congressionally established goals. It must develop a factual record, which accurately reflects the condition of the service or services to be subjected to the new regulatory framework. The Commission must also develop a factual record which reasonably forecasts the effect of its new regulatory framework on the service or services to be so regulated. Once it has created a record, the Commission must review it to determine that its new regulatory framework rationally relates to the goals it has established and any relevant Congressional goals, and, in fact, that the new regulatory framework is more likely to accomplish those goals than any other proposal then before the Commission.

¹ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd ___, ___, FCC 94-212, para. 11, 23 (released September 23, 1994) ("*CMRS Third Report and Order*").

² Further Notice of Proposed Rulemaking, 9 FCC Rcd ___, FCC 94-271, ("*Further Notice*"), para. 13.

In this proceeding, the Commission identified as its objectives: (1) providing opportunities for 800 MHz SMR system operators in all areas of the country to develop wide-area systems while also protecting the viability of smaller systems; (2) ensuring that all SMR licensees make productive use of the spectrum by constructing and implementing their systems promptly; (3) encouraging more efficient use of SMR spectrum, particularly in congested areas, through development of technologically advanced systems supporting enhanced services such as seamless wide-area roaming and high speed data transmission; and (4) removing any unnecessary regulatory burdens that hamper the efforts of 800 MHz SMRs to compete effectively with other CMRS offerings.³ Additionally, in the *CMRS Third Report and Order*, the Commission enumerated the Congressional goals which it considers guideposts as it establishes the new regulatory framework for CMRS. They are (1) create a level regulatory playing field for CMRS; (2) establish an appropriate level of regulation for the administration of CMRS; (3) resolve "substantial similarity" issues with a view toward ensuring that unwarranted regulatory burdens are not imposed on reclassified CMRS providers; and (4) promote the economic goals discussed in the *CMRS Second Report and Order*, including fostering economic growth, promoting investment in mobile telecommunications infrastructure, and enabling access to the national information superhighway. These goals continue as guideposts as the Commission continues its development of the new regulatory framework for regulation of CMRS.

By the proposal in the Further Notice, the Commission would designate ten (10) MHz of contiguous SMR spectrum in the 800 MHz band for licensing in four 2.5 MHz blocks in

³ Further Notice, para. 13.

each MTA. There would be no restrictions, however, on one entity acquiring all four blocks. By acquiring the MTA rights to a block of spectrum, the proposal would grant the following rights to the MTA licensee: (1) the right to construct at any available site within the MTA and to add, subtract or move site locations within the MTA during the license term on a "self-coordinated" basis; (2) the right to use any available spectrum within the licensee's designated spectrum block on a self coordinated basis, including full discretion over channelization of available spectrum within the block; (3) the right to use any spectrum within the MTA block that is recovered by the Commission from an incumbent SMR licensee in the event of termination of the incumbent's license; and (4) the right to negotiate to acquire incumbent systems within the MTA block, based on the initial finding that such assignments are generally within the public interest and would be approved by the Commission. The new licensee would have a five-year construction period from the date the MTA license is granted, with interim construction requirements. The proposal would allow incumbent SMR licensees to continue operating at the currently authorized sites and on previously authorized channels, requiring the MTA licensee to provide co-channel interference protection to such facilities.⁴ The proposal also requests comment on the mandatory relocation of incumbent licensees to make room for the MTA licensees.

⁴ The proposal also advances rules regarding the licensing of the remaining eighty (80) non-contiguous channels on a local basis.

II. GOALS

A. Commission Identified Goals

In this proceeding, the Commission has identified its own goals. These goals will serve as our guideposts in considering the propriety of the Commission's proposal, and in supporting the alternative plan set forth herein.

(1) Opportunities for 800 MHz SMR System Operators

The Commission has determined as its first goal, the preservation and the development of opportunities for system operators in all areas of the country to develop wide-area systems while also protecting the viability of smaller systems. The proposal set forth in the Further Notice not only fails to meet the goal of preserving and developing opportunities for SMR operators in all areas of the country, verily, this proposal will limit future entry into 800 MHz service to a single competitor. In fact, the Commission notes in the Further Notice that the record in response to the *CMRS Further Notice*⁵ included the Nextel Plan. Now, the proposal set forth in the Further Notice embodies the Nextel Plan. The proposal is so closely tailored to the needs of that single competitor that no other competitor will be able to participate in the new licensing framework, and it is clear that the Commission's proposal has been tailored to accommodate Nextel.

As an example of this fitting of the proposal to the Nextel Plan, the Commission has determined that incumbent 800 MHz licensees would be relocated to the "lower 80" block of

⁵ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, 9 FCC Rcd 2863 (1994) ("*CMRS Further Notice*").

SMR channels and possibly to the 150-channel block General Category band ("relocation channels") and that it should be the responsibility of the MTA licensee to arrange for and pay for the relocation.⁶ Substantially all of this spectrum is licensed. Of the incumbent licensees on these proposed relocation channels, only one entity, Nextel, holds or otherwise controls a significant number.⁷ Nextel is the only potential MTA licensee with sufficient relocation channels available to it to accomplish relocation of incumbent licensees in its MTAs.

Moreover, the Nextel Plan would have ten (10) MHz allocated to each MTA licensee. While the Commission's proposal specifies that each MTA license will give its licensee 2.5 MHz of 800 MHz spectrum, it does set aside an aggregate of ten (10) MHz of spectrum, and does not limit the amount of this spectrum which may be assigned to a single licensee. By the Commission's proposal, Nextel can acquire its needed ten (10) MHz of contiguous spectrum by being the high bidder on all four blocks in any given MTA.

Although the Commission's proposal puts forth a voluntary relocation scheme, it also requests comment on the mandatory relocation option advocated by Nextel.⁸

⁶ These relocation channels are technically inferior to the channels on which the incumbent 800 MHz SMR licensees currently provide service. This technical deficiency is discussed more fully below.

⁷ Since Nextel has acquired virtually all other major 800 MHz SMR operators in the United States (Questar, One Comm, Dial Page and Motorola), it has aggregated all of the relocation channels allocated to those entities. Combined with its substantial holdings, these acquisitions make Nextel the largest single holder of 800 MHz SMR licenses in the United States. See generally Petition for Partial Reconsideration filed by SMR Won, on December 21, 1994, in the *CMRS Third Report and Order*, GN Docket No. 93-252.

⁸ The illegality of the mandatory relocation option is discussed more fully below.

While it may, in theory, be acceptable for the Commission to embrace as its own the proposal put forth by Nextel, the difficulty with the current accommodation is its failure to enable other competitors to compete in the new regulatory framework. The Commission is thus hinging its hopes for expanded SMR services on the willingness and ability of Nextel to participate in the proposed MTA auctions.⁹ There is no other potential participant waiting in the wings to compete at auction and in the market place. No other competitor has expressed an interest in participating in the licensing process. In the pleadings filed in GN Docket No. 93-252, the proceeding which yielded the *CMRS Third Report and Order*, of the 800 MHz SMR interests represented who expressed interest in the Nextel proposal, most have been acquired by Nextel.¹⁰ Those which have not been acquired by Nextel are either rumored to be entertaining offers from Nextel¹¹ or too small to be serious competition at auction. Each of the other major communications industry players has defined its wireless niche, whether it is in existing cellular,¹² broadband PCS or narrowband PCS.¹³ The marketplace has not

⁹ To date Nextel has publicly stated its intention to participate in 800 MHz SMR auctions, however, a recent Wall Street Journal article raises questions as to Nextel's financial qualifications to bid at auction, complete its pending transactions and complete the implementation of its digital technology. Gautam Nake, for Nextel '94 Was Best of Times and Worts of Times, Wall St. J., Jan. 3, 1995, A14.

¹⁰ For example, although OneComm Corporation has been acquired by Nextel, it filed comments. Similarly, although Dial Page, Inc. had reached agreement with Nextel for acquisition of its facilities, it filed comments. Of course, Motorola and Nextel have long planned the merger of their interests. Motorola filed comments in the *CMRS Third Report and Order* proceeding.

¹¹ Although CCI has been unable to document this, rumors in the industry have Pittencrieff in agreement with Nextel for acquisition of its facilities.

¹² AT&T has acquired McCaw Cellular's facilities to provide its vehicle for entry into the wireless field.

yielded any serious competitor for Nextel and the Commission has not stated where it expects to find competitive bidders. Clearly, no 800 MHz SMR interest has been identified which might bring the market power or interest in the 800 MHz facilities to compete with Nextel either at auction or in the marketplace.

Because the Commission's proposal is so closely tailored to the needs of a single competitor, adoption of this proposal will lead to anticompetitive results. If only one participant bids at auction, the Commission will not realize a high value for the subject license. Further, instead of providing opportunities for SMR system operators in all areas of the country to develop wide-area systems, the Commission proposal will displace 800 MHz SMR system operators in all areas of the country, taking them out of the competitive market place. In the place of these many competitors the Commission will license a single entity to develop a wide-area system in the areas of the United States which that single entity chooses.

The incumbent licensees will either be driven out by being locked into their existing facilities with no room to grow either geographically or with additional frequencies or through relegation to an undesirable relocation position through mandatory relocation. Clearly, the Commission's proposal set forth in the Further Notice does not provide opportunities for 800 MHz SMR system operators throughout the United States. Further, it sounds a death knell for the business of smaller operators and will ensure that smaller operators never grow into larger operators.

¹³ For example, BellSouth was a successful bidder in the nationwide narrowband PCS services. Pactel has developed its wireless interest in Airtouch, a successful bidder for nationwide narrowband PCS facilities and narrowband regional PCS facilities. Moreover, Sprint, AT&T, Craig O. McCaw, PCS PrimeCo (a consortium of Bell Operating Companies), Pactel, SW Bell and GTE are all participating in the current broadband PCS MTA auctions.

(2) **Productive Use of the Spectrum**

The Commission's second goal is to foster productive use of the spectrum by requiring that licensees construct and implement operations of their systems promptly. In the *CMRS Third Report and Order*, the Commission established a uniform twelve (12) month construction and commencement of service period for all CMRS services licensed under Part 90 of the Commission's rules, except for wide-area systems. The Commission has traditionally granted longer construction periods for wide-area systems.¹⁴ Its proposal to grant five-year construction periods with interim coverage requirements does nothing to encourage more productive use of the 800 MHz SMR spectrum. Currently, the Commission allows five years for construction and commencement of operations for wide-area ESMR proposals. Instead of taking action to ensure compliance with the five year deadlines for those already licensed to provide ESMR service, the Commission grants relief to existing wide-area licensees by allowing them to count the license issue date from the date on which an MTA license is issued. Clearly, by the proposal comprising the Further Notice, the Commission fails to advance the productive use of the 800 MHz spectrum.

(3) **Encouraging More Efficient Use of SMR Spectrum**

The Commission's third stated goal of encouraging more efficient use of SMR spectrum, particularly in congested areas, through development of technologically advanced systems supporting enhanced services such as seamless wide-area roaming and high speed

¹⁴ See e.g., *Fleet Call Inc., Memorandum Opinion and Order*, 6 FCC Rcd 1533, recon dismissed, 6 FCC Rcd 6989 (1991); Letter from Ralph A. Haller, Chief Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (1993).

data transmission, is a goal already being met by the marketplace. Without the prompting of the Commission, several equipment manufacturers have developed technologically advanced systems for delivering voice and data via traditional SMR frequencies. Apart from the inherent difficulties of bringing new products to market, the difficulty in bringing these new products to market here is exacerbated by the proposal set forth in the Further Notice because its end result would be a grant of a significant portion of the 800 MHz spectrum to Nextel. Standing alone, this grant would make any independent manufacturer hoping to realize sufficient sales to realize any economies of scale dependent on the implementation of its product by Nextel. But when the grant of a significant portion of the 800 MHz SMR spectrum to Nextel is considered in combination with Nextel's merger with Motorola, Motorola will have such a large ready-made market for its products that it effectively bars entry of any other manufacturers to provide the competition necessary to spur further innovation in technology. CCI has encountered many manufacturers with highly developed prototypes which would rival and even surpass the Motorola equipment.¹⁵ These manufacturers, however, cannot bring a product to market without a significant commitment from a sufficiently large number of SMR operators to employ their equipment. Because of the regulatory uncertainty occasioned by this proceeding, no operator can commit to these manufacturers. The most efficient technology for transmission via 800 MHz SMR frequencies may then remain on the shelf, and therefore, the Commission's third stated goal not met.

¹⁵ See, for example, AirNet Communications Corporation -- profile attached hereto as Exhibit 2.

(4) **Removal of Unnecessary Regulatory Burdens**

As its fourth and final stated goal, the Commission advocates removal of any unnecessary regulatory burdens that hamper the efforts of 800 MHz SMRs to compete effectively with other CMRS offerings. As CCI noted in its Petition for Partial Reconsideration of the *CMRS Third Report and Order* filed with the Commission on December 21, 1994, the rules adopted therein and the Commission's proposal herein will place the 800 MHz SMR service at an incredible competitive disadvantage. As CCI noted in its Petition for Partial Reconsideration¹⁶ the Commission's proposal exacerbates the disparate treatment of commercial mobile service providers not only by creating disparate classes of service providers within 800 MHz SMR, but between those providing service via 800 MHz SMR facilities and cellular operators. While the 800 MHz service providers are dealing with auctions, relocation and disruption and resumption of service, cellular operators are continuing to provide service unfettered by an overhauling of its industry. As far back as 1969, the Commission has recognized the competitive advantage of the headstart the cellular operators will gain by implementation of the Commission's proposal.¹⁷ Clearly, the anti-competitive concerns addressed by the headstart policies are worsened by the implementation of a proposal which will give cellular a headstart in a mature industry. Existing SMR customers unwilling to abide the inconvenience attendant to interruption of the incumbent's service to make room for the MTA licensee may turn to the seemingly more reliable cellular

¹⁶ Petition for Partial Reconsideration filed December 21, 1994, CMRS Third Report and Order reprinted in 1993 U.S. C.C. A.N. 378, 586-587, attached hereto as Exhibit 3.

¹⁷ Radio Relay Corp v. FCC, 409 F 2d. 322 (D.C. Cir. 1969).

operator for uninterrupted service. This result is directly contrary to the Commission's goals and is clearly antithetical to the public interest.

B. Congressionally Mandated Goals

In the *CMRS Third Report and Order*, the Commission recognized four goals set forth by Congress as its guideposts in creation of the new regulatory framework for CMRS. An assessment of the instant proposal in comparison with the Congressional goals reveals that this proposal falls short of Congress' expectations, and so adoption of this proposal is inappropriate. These four goals are closely related and reveal Congress' intent to authorize the Commission to regulate the "offering" of commercial mobile services -- not authorize a complete overhaul of an industry.

(1) Level Regulatory Playing Field

Congress' first goal is the creation of a level regulatory playing field for all services comprising CMRS. A review of the Legislative History published with the Budget Act demonstrates that Congress sought similar regulatory treatment for all providers of commercial mobile service. Specifically, Congress was concerned that SMR service providers were providing a service indistinguishable from cellular service¹⁸, while cellular service providers were subject to a panoply of burdensome common carrier regulations which do not apply to SMR service providers. Congress, in enacting the revisions to Section 332(c) of the Act intended that all CMRS providers be regulated as common carriers.

¹⁸ Budget Reconciliation Act, House report 103-111, 103rd. Cong., 1st Sess. (1993), reprinted in 1993 U.S.C.,C.A.N. 378, 586-587.

Congress specified its concerns regarding the application of the requirements of Title II of the Act to common carriers while those providing similar service as private land mobile carriers were not subject to such onerous requirements. Included in the enumerated concerns were rate regulation and state entry and rate regulation. Congress was concerned that as existing services grow and new services emerge, those regulated as common carriers would be disadvantaged vis-a-vis those regulated as private land mobile service providers.

The Commission's proposal in the Further Notice, however, does not achieve a level regulatory playing field among all CMRS providers as envisioned by Congress. In fact, the proposal disadvantages both incumbent SMR licensees and the prospective MTA licensees, both in relation to each other and together in relation to incumbent and prospective cellular service providers. This disadvantage is so great as to possibly thwart growth of CMRS service at 800 MHz so much that the industry is effectively killed just as it grows more competitive.

By the Further Notice, the Commission proposes to license spectrum already occupied by existing licensees, requiring the existing licensees to relocate.¹⁹ This proposal is inconsistent with Commission policy and directly at odds with the Congressional mandate to achieve a level regulatory playing field among CMRS providers.

In ordering a level playing field among the two services -- cellular and SMR -- Congress intended to order competition among all CMRS providers, including as among 800

¹⁹ If the incumbent licensees are not forced to relocate, at the very least, under the plan adopted by the Commission, they will be seriously constrained in the modification and expansion of their systems, artificially limiting their ability to compete in the CMRS marketplace.

MHz SMR operators. Yet if adopted the Commission's proposal will create double disparity for incumbent 800 MHz SMR licensees. The proposal would require incumbent licensees to migrate to a new portion of the spectrum, with all the attendant disruption, in order to auction the spectrum occupied by them to other 800 MHz SMR competitors. As a result, the newcoming SMR competitor will be able to serve broader MTA geographic areas and utilizing blocks of 2.5 MHz of spectrum.²⁰ The incumbents will be migrated to less desirable portions of the spectrum with far less available spectrum space and will be licensed on the traditional site-specific basis, and will be forced to compete as CMRS from this disadvantaged position. Clearly, creation of new classes of disparately treated CMRS operators is at odds with the level playing field envisioned by Congress.

(2) Appropriate Level of regulation of CMRS

Congress also has demanded that the Commission establish an appropriate level of regulation for the administration of CMRS. Fortunately, here again, the legislative history of the Budget Act gives some guidance as to Congress' intention. "This section requires the FCC to review its rules affecting private land mobile services and within one (1) year issue such changes as may be necessary to achieve regulatory parity for those persons providing equivalent services. It is the intent of the Committee that the Commission make a complete assessment of its rules affecting private land mobile, including loading requirements, spacing limitations and others to determine whether such rules still serve the public interest in light of the changes made by this legislation. Current Commission policy prohibits common carriers

²⁰ Of course, the MTA licensee may be authorized to operate on 2.5, 5, 7.5 or 10 MHz of spectrum depending on its strategy and success at auction.

from being licensed to provide Specialized Mobile Radio Service. The Committee encourages the Commission to re-examine this restriction in light of enactment of this section to determine the extent to which such a restriction is in the public interest."²¹ Congress clearly intended to affect the regulation of the "offering" of all commercial mobile services to ensure all CMS operators are treated as common carriers. The Commission, however, proposes the complete overhaul of an industry, far in excess of the expressed intent of Congress. Congress intended that the Commission should regulate the existing industries at an appropriate level which yields equal treatment, i.e., equal loading requirements, equal opportunity to concentration of service (relief from spacing rules), for all variously situated commercial mobile service providers. Clearly upending the entire SMR industry is a measure which exceeds an appropriate level of regulation.

(3) Resolve "Substantial Similarity" Issues

In a related goal, Congress also required that the Commission resolve "substantial similarity" issues with a view toward ensuring that unwarranted regulatory burdens are not imposed on reclassified CMRS providers. Having articulated its demand that all commercial mobile service providers be treated as common carriers, Congress was apparently concerned that such similar treatment for such licensees would result in "unwarranted regulatory burdens."²² To address this concern, Congress specified where the Commission could look to relieve such unwarranted regulatory burdens on commercial mobile service licensees. Specifically, Congress authorized the Commission to relieve commercial mobile service of

²¹ Budget Act, 103 U.S. Code, Congressional and Administrative News, p. 589 (103 Cong., 1993).

²²

Title II requirements with certain enumerated exceptions. Again Congress expressed its intent that the Commission revise its rules relating to the offering of CMRS services. Congress never intended the overhaul of the 800 MHz SMR industry proposed in the Further Notice.

(4) Economic Goals

The economic goals discussed in the *CMRS Second Report and Order*, include fostering economic growth, promoting investment in mobile telecommunications infrastructure, and enabling access to the national information superhighway. Specifically, the Commission identified as a congressional goal stimulation of job and economic growth. It noted that "Success in the market place thus should be driven by technological innovation, service quality, competition-based pricing decisions and responsiveness to consumer needs and not by strategies in the regulatory arena."

The Commission also noted Congress' intention to promote investment in the communications industry. The Commission committed itself to create incentives for investment in the development of communications services -- rather than as a burden standing in the way of entrepreneurial opportunities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Finally, the Commission notes that our national economy is strengthened by promoting and achieving the broadest possible access to wireless networks and services by all telecommunications users. The Commission therefore considers the creation of a regulatory framework which makes access to the wireless infrastructure available to all citizens a priority.

The proposal fails to meet these economic goals.²³ In fact, the proposal sponsors growth for a single large company. This single large company provides services which, according to the Wall Street Journal, lack consumer appeal. Despite this lack of consumer interest, this one large company would displace some thirty-three thousand (33,000) incumbent 800 MHz SMR licensees currently providing robust service. It would move in and triple prices for dispatch service.²⁴ Clearly, this illogical switch of licensees with attendant disruption and delay of service is inconsistent with the public interest.

The existing 800 MHz SMR service providers have grown significantly since the beginning of the industry. If left alone, these operators could continue to grow. Their growth is limited only by the available spectrum. If the Commission adopts the proposed framework, existing operators will be, at the very least, frozen in place, both geographically and in the number of channels licensed to them. If mandatory relocation is ordered, these operators will be forced to interrupt service to the public and re-commence operations on inferior channels.

Second, among the cited economic goals is the promotion of investment in the communications industry. From the January 3, 1995, Wall Street Journal article, it is clear that Nextel has exhausted its ability to raise funds. Yet, Nextel is still before the Commission asking that incumbent licensees, whose commitment to investment in their

²³ See Comments of Clarks Electronics, Teton Communications Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu Comm, Inc., Earl's Distributing Inc. and Earl's Wireless Communications, filed December 14, 1994, In the Matter of Applications of Nextel Communications, Inc. for transfer of Control of OneComm Corporation, N.A. and C-Call Corp., DA 94-1087.

²⁴ Wall Street Journal article, supra note 9.

communications facilities is demonstrated, be relocated so that it might stretch itself thinner yet. Instead, the Commission must be mindful of its economic goals, and leave the opportunities in place which are already being developed by the incumbent licensees. As is noted by the commenters in the Nextel/OneComm merger,²⁵ and as is corroborated by CCI, many local 800 MHz SMR licensees have joined together to form regional networks allowing their customers to utilize equipment and service originally provided only locally throughout the regional system. These regional systems will implement more efficient digital equipment in providing this wide-area service. The Commission's proposal in the Further Notice will be a burden standing in the way of entrepreneurial opportunities for all potential service providers but one. Clearly then, the proposal diminishes the Commission's opportunity to accomplish the second of its economic goals.

Finally, among the economic goals the Commission enumerated in the *CMRS Second Report and Order*, the Commission desires the broadest possible access to wireless networks and services. Currently 800 MHz SMR operators provide a valuable service connecting mobile users for about eighteen dollars (\$18) per subscriber per month. This represents a cost savings of about Forty Dollars (\$40) per subscriber per month over the more sophisticated cellular service. This lower cost service clearly provides service to customers for whom the substantially higher cellular bill would pose a barrier to subscription. As the Wall Street Journal reports,²⁶ Nextel proposes to occupy the very spectrum providing this

²⁵ See Comments of Clarks Electronics, Teton Communications Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., AccuComm, Inc., Earl's Distributing, Inc. and Earl's Wireless Communications, filed December 14, 1994 in DA 94-1087.

²⁶ See note 9.

low cost service to provide a deluxe service, complete with unwanted bells and whistles at three times the cost currently paid by traditional dispatch customers. With this price hike, most assuredly a substantial number of customers are likely to discontinue their participation in the wireless portion of the information highway, contrary to the third stated economic goal.

The proposal contained in the Further Notice fails to achieve any of the stated economic goals. In fact, it would serve to diminish competition by licensing only one competitor in the 800 MHz SMR service. The grant of such a monopoly is clearly contrary to the public interest.

III. CCI'S PROPOSAL

As an alternative to the Nextel Plan, CCI would urge the Commission to comply with the Congressional mandate to regulate its SMR facilities on par with cellular facilities. This would subject CCI and all other 800 MHz SMR operators providing interconnect service, to all applicable Title II requirements. Under CCI's plan, the Commission will auction all remaining 800 MHz spectrum as mutually exclusive applications are received for it. In accord with Title II, any application for new facilities in the 800 MHz SMR frequencies would be placed on public notice. Such an application would be subjected to the filing of mutually exclusive applications and petitions to deny. Existing licensees would be allowed to continue current operations and encouraged to form regional alliances implementing ESMR-type digital transmission equipment.

Specifically, CCI's proposal would:

- preserve the rights and market position achieved by incumbent 800 MHz SMR licensees;
- license all remaining available spectrum by competitive bidding;
- encourage the creation of cooperative regional systems among local SMR operators;
- Step up enforcement of construction schedules proposed by ESMR licensees within the five year construction period authorized by Section 90.129 of the Commission's rules. 47 C.F.R. § 90.129;
- Encourage cooperative alliances forming regional ESMR digital transmission systems.

The Commission recognizes that substantially all of the spectrum allocated to 800 MHz SMR has been licensed. Rather than create chaos by granting a second authority on top of existing services, in order to achieve a smooth transition to CMRS, the incumbent licensees must be left in place. While the site and frequency specific licensing traditionally employed in Part 90 services has created a patchwork of facilities, the marketplace has been correcting this situation for some time now. Before the Nextel nationwide consolidation, regional operators were consolidating 800 MHz SMR systems in their respective regions, relieving the patchwork distribution to a significant degree. To the extent frequencies are available to be licensed on an MTA basis, such geographic division would be appropriate. Unfortunately, there are no frequencies available to be licensed on such a wide area basis.

In light of this situation, the Commission must continue to license new facilities as channels are available, subject to Title II licensing requirements.

Similarly, because no spectrum is available for block licensing, the Commission must continue to license frequencies as they are available. Players in the marketplace have been

consolidating facilities, creating blocks of frequencies. This orderly transition must continue in order to preserve the goals established by the Commission and Congress.

CCI's proposal will achieve the Commission's goals and Congress' goals without compromising the interests of incumbent licensees.

Specifically, CCI's proposal will continue the Commission's policy of providing opportunities for 800 MHz SMR system operators in all areas of the country to develop wide area systems while also protecting the viability of smaller SMR systems. Because the CCI plan would encourage the development of wide-area systems through cooperative ventures among local SMR service providers, instead of resulting in interruption and delay in service, existing service would continue and improve by giving customers the ability to use equipment throughout the region. The resulting benefit to the public interest in elimination of the uncertainty occasioned by the upending of the industry proposed in the further notice is compelling.

Additionally, by enforcing the construction schedules proposed by ESMR applicants and licensees, the Commission will ensure productive use of the spectrum during the extended implementation period.

Because more players will be developing wide-area service, more equipment manufacturers will develop and deploy technologically advanced systems as envisioned by the Commission. This competition among manufacturers will yield even more advanced equipment and efficient use of the available spectrum.

Finally, removal of the specter of the Nextel proposal will remove unnecessary regulatory burdens which stifle the 800 MHz SMR operator's ability to compete and provide